


Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

To: Julia D'Alesandro, Audit Dept.
From:  Brent Johnson, General Counsel
Re: Allowable Fees and Costs
Date: July 20, 2004

In response to your e-mail of July 9, 2004, I will try to provide some additional guidance on when courts may assess fees and costs. As mentioned in my previous memoranda, specific direction on which costs can be imposed may be difficult. However, I can perhaps provide more direct guidance on what courts cannot do.

The fundamental basis for resolving this issue lies in the Utah and United States Constitutions. The Constitutions' due process clauses essentially state that a defendant may not be deprived of life, liberty or property without due process of law. A defendant cannot be required to pay fines, fees, costs, etc., without a judge specifically imposing those costs after giving notice to the defendant and an opportunity for the defendant to be heard. A court thus cannot require a defendant to pay any costs or fees prior to a case being adjudicated.

Prior to adjudication, a court can order a defendant to post bail. If a defendant does not post bail and then fails to appear, a court can increase the amount of bail that a defendant is required to post. Bail is not a penalty. It is posted in order to guarantee a defendant's appearance. If a defendant fails to appear, the court can forfeit the bail. The Utah Code specifically allows forfeiture. However, the Code does not allow courts to impose costs as a part of this type of forfeiture.

Prior to adjudication, a court could maintain a list of costs that it might impose on a convicted defendant. However, the costs cannot yet be imposed. If a defendant posts bail, whether in the amount originally required, or in an increased amount, pursuant to Utah Code Ann. § 77-7-

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efficient, and independent system for the advancement of justice under the law.**

21(1)(b)(c) a defendant may voluntarily forfeit bail and the voluntary forfeiture of bail is treated the same as a guilty plea. Because the case is then adjudicated, the court can then appropriately take the amount posted as bail and apply it as the defendant's penalty.¹

The difficult question at this stage is how the forfeited bail can be distributed. Section 77-32a-1 states that "in a criminal action the court may require a convicted defendant to pay costs." This statute would seem to allow costs to be imposed on a defendant who voluntarily forfeits bail and is thereby considered to be "convicted." However, due process requires that the defendant receive notice of the costs that the defendant is required to pay. Without such notice, I do not think a court can impose costs. The court could therefore not apply the forfeited bail to costs under the above circumstance. All of the forfeited bail should be treated as a fine.

In a typical case, a defendant who receives a citation will receive a notice from the court stating the amount of bail that the defendant should send to the court. The defendant may remit the amount stated and then allow the court to forfeit the bail as a fine. Because there would not be anything unusual in such a case, the court cannot impose or collect any of the money as costs.²

If a defendant fails to respond or fails to appear, a court might be able to notify the defendant that it intends to impose a specific amount for court costs in the event of voluntary forfeiture of bail or in the event the defendant appears and enters a guilty plea or is otherwise convicted. The court could impose costs upon such specific notice.

As stated in my previous memoranda, the language of the statute does not provide any detailed direction on the costs that a court can impose. Because the statute only allows costs which are "specially incurred," a court must be able to justify the costs using solid evidence to support the figure. In civil cases, when a litigant seeks an award of costs, the litigant must be able to specifically itemize the amounts that are sought. Each item must be supported with receipts or other documentation. A civil litigant cannot be awarded general costs; every penny must be justified. The same should be true in criminal cases. The state or political subdivision should be able to specifically articulate the bases for the costs. This is a fundamental aspect of due process and ensuring that a defendant has adequate notice of the basis for the amount that is being assessed.

If I could review a specific list of costs that courts are imposing, I may be able to offer an opinion on the legality of the costs. The things that will be clearly legal are those which will be found in the law, such as mileage for sheriffs' travel, or can otherwise be supported with documentation. Other costs will be questionable.

¹The law is unclear about whether the forfeited funds can be converted to a fine payment or can only be treated as a bail forfeiture. However, resolving this issue is not critical to resolving the cost question.

²Because, as stated in my previous memoranda, costs can only be those expenses which were specially incurred.

In post-adjudication situations, the same principles essentially apply. Due process requires the court to give notice and an opportunity to be heard before a defendant is ordered to pay post-adjudication costs. As stated in my previous memorandum, post-adjudication costs should generally only be imposed as a part of contempt proceedings. A court cannot simply increase a previously imposed sentence. A court's authority is generally limited to contempt.

When you are auditing, you should therefore look at two different factors: were the costs imposed only after notice and an opportunity to be heard; and is there adequate documentation or evidence to support the costs? This should help in resolving these issues.

If you have any additional questions about this, please let me know.